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ngton, D.C. Mayor, 1858–1861 (James G. Berret)

MESSAGES

OF

J. G. BERRET, MAYOR,

VETOING

"AN ACT AUTHORIZING THE ERECTION OF A MARKET-HOUSE IN THE SEVENTH WARD,"

AND

"AN ACT FOR SUPPLYING THE WASHINGTON ASYLUM WITH WATER, AND TO PROTECT IT AGAINST LIGHTNING;"

ALSO

"AN ACT REGULATING THE DISTRIBUTION OF POTOMAC WATER THROUGHOUT THE CITY OF WASHINGTON;"

TOGETHER WITH THE

OPINIONS OF J. M. CARLISLE, CORPORATION ATTORNEY, THEREON.

MAYOR'S OFFICE,
WASHINGTON CITY, *May* 2, 1859.

GENTLEMEN: Herewith I return to the Board of Aldermen, in which they severally originated, two ordinances entitled respectively, "An act authorizing the erection of a market-house in the Seventh Ward," and "An act for supplying the Washington Asylum with water, and to protect it against lightning;" which ordinances I cannot approve, for the reasons which I now proceed to state.

Certain propositions may, in the first place, be stated as self-evident. The Charter of our city has provided us with a government, in which the legislative and executive functions—the power to make the laws and the duty to see them properly executed—are clearly separated and defined. This distinction, so easily to be detected and of such vital importance to the perfect accomplishment of the end of the Charter, it is our plain duty scrupulously to observe and respect. We have, indeed, no legal power to act, or to bind in any manner the people of this city, in their persons or property, otherwise than in accordance with these clearly-defined and fundamental principles of the organic law.

If, then, it shall be found, upon a careful consideration of these ordinances, that they are repugnant to these fundamental truths, you will, I feel confident, agree with me that they cannot become the law. I am aware that they are not wholly without precedent; but it is equally certain that, whatever examples of such legislation are to be found in our municipal history, they have no other authority than that which may belong to them as measures adopted without any attention having, at the time, been drawn to the objection now made; and persuaded, as I am, that this objection is radi-

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cal and insuperable, I cannot reconcile it to my sense of duty to recognise any such precedents.

The "act authorizing the erection of a market-house in the Seventh Ward," not only authorizes that work, giving directions as to its location and plan, and making the necessary appropriation of money for that purpose, but by its second section it proceeds to make provision for the *execution* of the law in a manner wholly inconsistent with the office and duty of the Mayor. In fact, it proposes to reduce that office and duty to a mere cypher in this particular matter. Its scheme is to make the Mayor one of a body of three, created for this occasion, to execute, or cause to be executed, a law of this Corporation. And this triumvirate, unknown to the letter or spirit of the Charter, has the additional objection that the majority is to be composed of the representatives of the two Boards which compose the legislative branch, acting in their capacity of members of each Board respectively; thus directly intruding the legislative into the executive province, and attempting to overshadow and control the Mayor in the performance of those duties for the discharge of which the people of this city have been pleased to elect *him*, while they have elected the members of the two Boards for another and a very different purpose. In matters of principle it is perfectly legitimate, and sometimes indispensable, to compare things which are widely different in magnitude and degree; and I therefore put this case to you: suppose an act of Congress were proposed authorizing and directing any public contract to be made, and undertaking to prescribe the execution of the law by a committee composed of the President of the United States and one member of each House of Congress; would any man, except the author of such a bill, hesitate to pronounce it unconstitutional? Could any person charged, by his election and his oath, with the executive duty—feeling the responsibilities of the first, and having a due comprehension of the latter—give his assent to an act which, while infringing upon the prerogatives of his office, disturbed the balances of the fundamental law? And yet, in principle, there is no difference between that case and this. It is perfectly well known to every intelligent reader of the city charter that our municipal government, in all that concerns the present question, is a miniature of the Federal Government, and the government of the States generally. Indeed the same principle, it is believed, characterizes all our municipal governments which have been framed with any degree of care or foresight. It is one which does not commend itself solely by dogma or precedent, but by enlightened reason and a prudent regard to the public interest. It does not simply concern the executive or legislative branch of the city government in any mere personal or official sense; it relates to our common constituency, whose whole interest cannot be fully and perfectly protected, except by jealously guarding that careful and necessary adjustment and

balance of power which was intended to make each department, acting in its appropriate sphere, a watch and a check on the other, and which is clearly evaded by the peculiar provisions of the ordinance in question. In the nature of things, the making of laws and the execution of them ought to be placed in different hands. But, whether this be so or not, it is clear, beyond any question, that such has been the will and enactment of Congress in creating this Corporation. In authoritive illustration of this, no stronger case can be put than that which was determined by the unanimous judgment of the Circuit Court of this District, in pronouncing void the provisions made for the execution of the laws generally, by police magistrates elected by the two Boards, instead of being appointed on the nomination of the Mayor, by and with the advice and consent of the Board of Aldermen.

Under the provisions of the Charter the voters of this city have intrusted to a majority of each of the Boards comprising the Council, with the assent of the Mayor, or two-thirds of each without his assent, the power of framing the laws; while to the Mayor, and to the Mayor alone, it has intrusted the power and duty of seeing that they are faithfully executed; and it is with a full sense of the responsibility thus imposed upon me that I have solemnly sworn to discharge that duty "to the best of my skill and judgment, without favor or partiality."

While I hold this office, which the partiality of my fellow-citizens has clothed me with, I can venture to assure you, gentlemen, that it is my intention, and shall be my constant aim, to avoid the slightest invasion of your chartered rights and privileges. While I shall be scrupulous in this regard, I shall be equally jealous (not on my own account, but in reference to the constituency I represent) that the powers and prerogatives of the office I hold shall, so far as I have the means of preventing it, be in like manner shielded from invasion. Neither you nor any of my fellow-citizens can reasonably expect of me that I should place myself in tutelage, or suffer my conduct to be controlled by voluntarily becoming one of a committee of three for the discharge of my duties. Whatever superior wisdom or experience may reside in the two Boards, (which I do not question,) we at least derive our powers from the same sources—namely, the confidence of our fellow-citizens and the Charter of Congress, and with a view to these alone are we to estimate our respective responsibilities.

I do not question the power of the Councils by an ordinance which shall receive the approval of the Mayor, or be passed in the prescribed mode, notwithstanding his *veto*, to direct the terms of any contract, or to surround the making of any contract by all the guards and restrictions which may be deemed advisable. This would be the act of the whole Corporation, within its legitimate sphere; and it has the undeniable right to fix the terms and condi-

tions upon which it will be bound by a contract. But I deny the right to direct the *execution* of such an ordinance in the manner proposed in the present case.

With regard to the "*act for supplying the Washington Asylum with water, and to protect it against lightning,*" the same principles are applicable to the provision "for providing and putting up lightning rods." With respect to the recital therein contained, of a contract heretofore made by the Mayor and joint committee for the plumber's work of that building, I have to say that no such contract was made by me; and if it was made by my predecessor during the execution of the work contracted for by Gilbert Cameron, I am not prepared, without further information, to sanction an agreement made with any other person, pending that contract, for extra or additional work upon the building.

Considering the importance of the question touching the respective powers and duties of the Councils and the Mayor, and in view of other pending measures involving the same question, I have thought it proper to take the advice of the Attorney of the Corporation upon that subject, and have found his opinion to accord with my own.

It is hardly necessary for me to say that it would give me pleasure to approve an ordinance for the erection of a market-house in the Seventh ward, and to supply the Washington asylum with water, and to protect it against lightning, framed in accordance with the charter.

Very respectfully,

JAMES G. BERRET, *Mayor.*

OFFICE OF THE CORPORATION ATTORNEY,

Washington, May 5, 1859.

HON. JAS. G. BERRET, *Mayor:*

SIR: I have to acknowledge the receipt of a copy of the resolution of the Board of Aldermen, requesting to be furnished with the opinion of the Corporation Attorney, alluded to in the message vetoing the "act for supplying the Washington Asylum with water," &c., and the "act authorizing the erection of a market-house in the Seventh Ward."

That opinion, though formed upon great consideration, was, as you are aware, communicated to you verbally, and was not thought necessary to be reduced to writing—your intention then being to present the grounds fully in the message itself.

I have perused that paper very carefully, and do not perceive that I can add anything to its contents to make my view of the legal question more intelligible, or the reasons which support it more satisfactory.

I am, sir, very respectfully, your obedient servant,

J. M. CARLISLE, *Attorney, &c., &c.*

MAYOR'S OFFICE, WASHINGTON, *May* 16, 1859.

To the Board of Aldermen:

GENTLEMEN: I regret to be obliged to return, as I now do, without my approval, the ordinance entitled "An act regulating the distribution of Potomac water throughout the city of Washington."

In obedience to the Charter, I proceed to state the reasons for withholding my signature to this act.

In my message of the second instant the general principles governing my conduct upon questions concerning our relative duties and obligations under the Charter are sufficiently stated. I have nothing to add or to retract in that behalf. It only remains for me to call your attention to the application of those principles to the matter in hand.

By the 12th section of this ordinance you propose that I shall attend your meetings and witness the discharge by you of duties which are, in their nature, incident to the office held by me. For any purpose whatever, except the taking of my official oath as prescribed by the Charter, I am not aware that it is proper for me to be present at a joint meeting of the two Boards, or at their meetings severally. But for the particular purpose of giving a tacit sanction to proceedings in which it is not possible that I can take any part whatever, and which are to result in an "absolute" award by you binding the Corporation to a contract, it seems to me that my presence would be eminently improper.

The proposed ordinance directs that bids for the contracts which it contemplates shall be made in duplicate, and "transmitted," one copy to the President of the Board of Aldermen and one copy to the President of the Board of Common Council." The Mayor is, by the terms of the ordinance, apparently expected to be present; but, in the event of his failure to attend, it is provided that the contracts shall be absolutely awarded, "*the Mayor being absent.*"

I am unable to perceive any possible ground upon which such a course of proceeding can be reconciled with our respective functions as defined by the Charter. In approving it I should, in my judgment, assent to a complete extinguishment of the distinctive duties of the Executive, and a practical obliteration of the boundaries between us which Congress has thought it wise to erect.

I will only add that if any occasion can give peculiar claims upon upon us for the most scrupulous attention to the will of Congress as expressed in the Charter, it would seem to be the present, when we are about to avail ourselves of so bountiful and munificent a gift.

Although I have not been embarrassed by doubts as to the true construction of the Charter, so far as it relates generally to the respective functions of the Mayor and the two Boards, nor as to what should be my course in this special case, yet, in order to com-

mend my action to the more favorable consideration of the Board, with which, very much to my regret, I find myself compelled to differ, I have requested the Corporation Attorney, who, by an act of May 28, 1853, is made the legal adviser of the Mayor, to examine the particular question of disagreement and give me his opinion thereon in writing. To that opinion, which I herewith communicate, and which from the justly-deserved professional distinction of its author, it is hardly necessary for me to say is entitled to your attentive consideration, I respectfully refer as containing more at length the special grounds upon which I have felt myself impelled to withhold my assent to the bill in question.

Very respectfully,

JAMES G. BERRET, *Mayor.*

OFFICE OF CORPORATION ATTORNEY,
WASHINGTON, *May* 12, 1859.

HON. J. G. BERRET, *Mayor:*

SIR: In compliance with your request I have examined and considered the 12th section of the act "*regulating the distribution of Potomac water throughout the city of Washington,*" with a view to the question whether the provisions of that section are in conformity with the Charter.

On a recent occasion it became my duty to express to you what I entertain no doubt are the true principles of our city government in respect of the relative functions of the Mayor and the two Boards. These principles indeed are so obvious and so inseparable from the very existence of that government, as it has been created and defined by Congress, that I do not think any candid mind can seriously dispute them. If they are found to be irksome or unsuited to the exigencies of the times, or of any particular occasion, they are nevertheless binding until the Charter shall have been essentially and completely changed; and its change can only be accomplished by the power which brought the Corporation into existence in its present form; nor is it possible for any ingenuity to devise a plan or scheme which shall disregard these principles, and practically confound the legislative and executive duties, without a plain violation of the Charter. It has not been the pleasure of Congress to intrust the government of the city to a single assembly, or to two assemblies, but to a Corporation, composed of two Boards, differently constituted and having in some respects distinct functions, and a Mayor, who is not the agent or servant of the two Boards, but a co-ordinate and independent branch of the government, having, with a qualified participation in the making of the laws, the exclusive duty of seeing to their faithful execution. It was from a regard to these principles that I felt bound to advise you, in the regular

course of my official duty, that the two ordinances, referred to in your message of the second instant, were not in conformity with the Charter.

I am of opinion that the twelfth section of the Water Act is liable to the same objection. Its whole scheme is (so far as I am informed) an entire novelty in our city legislation. It has for its object, not the making of a law to be executed in the usual way, but the conversion of the two branches of the municipal legislature into a sort of administrative board, to open and examine bids and "award" contracts among the bidders, the Mayor being invited to be present at that proceeding in some undefined, and to me not conceivable, capacity, without any power under the Charter to participate at all in the business, or even to open his mouth by way of making any observation upon it. It proposes that he shall personally attend the Councils in his capacity of Mayor, to see the Presidents of the two Boards open the duplicate bids, which are to be addressed to them respectively, and to witness the process of "carefully examining and comparing all the received proposals;" and, after he has performed this insignificant ceremony, "*the said City Council*" shall "*award*, by ordinance of the Corporation, the contracts *absolutely* to the lowest responsible bidder or bidders;" but "*if from any cause the Mayor should fail to be present at the said joint meeting, that then and in that case the two Boards shall proceed to make said award, the Mayor being absent;*" the "said award" having been, by the immediately preceding clause of the section, declared to be absolute, or, in other words, final and conclusive, vesting in the bidder so selected a legal and perfect right against the Corporation. In my opinion, to sign such an ordinance would be a formal and unwarrantable surrender of the independent trust and duty which the Charter has imposed upon the office of Mayor, and for the execution of which the people of this city have been pleased to elect you.

I am, sir, very respectfully, your obedient servant,

J. M. CARLISLE, *Attorney, &c.*

Copy of section 12, *above alluded to.*

"Sec. 12. *And be it enacted*, That the Water Registrar, immediately after entering upon the duties of his office, and annually, on or about the first day of February, advertise for a period of from ten to thirty days in at least two daily newspapers published in Washington having the largest subscription lists, inviting sealed proposals in duplicate, to be transmitted one copy to the President of the Board of Aldermen and one copy to the President of the Board of Common Council, for furnishing, during the current year, delivered in this city, of all water mains, valves, branches, bends, sleeves, caps, Corporation stops, fire-plug hydrants, and every other article or thing required in distributing the water; and also, after having divided the city into districts by wards, or otherwise, for the trenching, laying of the mains complete, inserting the valves, branches, and outlets; erecting the fire-plug hydrants; filling, ramming, and leveling the ditches and excavations; designating the probable number of feet of main and size, and the quantity of every other

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article or thing enumerated required to be furnished or laid during the year; and naming a time when such sealed proposals will be opened in joint meeting of the two Boards of the City Council. And all such proposals shall, at the time named in such advertisements, be opened and read in the joint meeting of the two Boards aforesaid and in the presence of the Mayor. All proposals for contracts shall be for a sum certain as to the price to be paid or received; and no proposition which is not thus definite, or which contains any alternative condition or limitation as to price, shall be entertained or acted upon. No more than one proposal shall be received from any one person for the same contract, and all the proposals of the person offering more than one shall be rejected. And the said City Council shall, after carefully examining and comparing all the received proposals as aforesaid, award, by ordinance of the Corporation, the contracts absolutely to the lowest responsible bidder or bidders: *Provided*, That if, from any cause, the Mayor should fail to be present at the said joint meeting, that then and in that case the two Boards shall proceed to make said award, the Mayor being absent.

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